No. 84-589 (6)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PAUL EDMOND DOWLING,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Motion & BRIEF OF AMICUS CURIAE RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC. IN SUPPORT OF RESPONDENT

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Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae

The Recording Industry Association of America, Inc. (hereinafter "RIAA"), hereby respectfully moves for leave to file the attached brief, as *amicus curiae* in this case. The consent of the attorney for the Respondent has been obtained. The consent of the attorney for the Petitioner was requested. The attorney for the Petitioner stated that he is not willing to consent to the filing of the attached brief. He further stated, however, that if this Court finds the attached brief to be helpful, he would have no objection to its being filed.

RIAA is a not-for-profit New York corporation, whose membership consists of recording companies accounting for more than 85 percent of the authorized prerecorded records and tapes manufactured and sold in the United States. Among RIAA's purposes is to represent its membership before legislative, regulatory and judicial bodies with respect to federal, state and local legislation and regulations affecting the entire recording industry.

The RIAA is actively engaged in a far-reaching program aimed at curtailing illegal practices relating to record piracy in its various forms. To this end, the RIAA maintains an Anti-Piracy Unit consisting of a Director of Anti-Piracy Operations, attorneys and a nationwide staff of investigators, to collect and collate piracy information on a national scale for dissemination to federal, state and local law enforcement and other government agencies and recording companies. The Anti-Piracy Unit seeks to develop findings which lead to effective enforcement of federal and state laws which protect its members' rights by prohibiting, along with other forms of "piracy", bootlegging and the unauthorized duplication of musical compositions. It also seeks to obtain federal legislation providing for more effective anti-piracy protection through the facilitation of enforcement of copyright laws for musical compositions and increased criminal penalities for convicted pirates, counterfeiters and bootleggers, and seeks to secure the enactment and enforcement of state anti-piracy laws.

In the instant case, the issues presented concern whether copyrights can constitute goods, wares or merchandise capable of being stolen, converted or taken by fraud within the meaning of 18 U.S.C. Section 2314. As representatives of recording companies whose interests in intellectual property include the ownership of thousands of copyrights, it is believed that the brief which the RIAA as *amicus curiae* is requesting permission to file will contain a discussion of how intellectual property, including copyrights, are treated as valuable assets in commerce by their owners, as well as the legal recognition of the same.

As a national trade association representing members doing business involving intellectual property in all 50 states, it is of vital importance to our membership that a conflict among the circuit courts involving a key issue regarding the treatment of the theft of their intellectual property be resolved.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC. IN SUPPORT OF RESPONDENT

The Recording Industry Association of America, Inc. (hereinafter "RIAA") hereby submits this brief *amicus curiae* in support of the Respondent.

INTEREST OF AMICUS CURIAE

RIAA is a not-for-profit New York corporation, whose membership consists of recording companies accounting for more than 85 percent of the authorized prerecorded records and tapes manufactured and sold in the United States. Among RIAA's purposes is to represent its membership before legislative, regulatory and judicial bodies with respect to federal, state and local legislation and regulations affecting the entire recording industry.

In its quest for protection of intellectual property including sound recordings and musical compositions, the RIAA is actively engaged in a far-reaching program aimed at curtailing illegal practices such as piracy, bootlegging and counterfeiting.[1] The scope of RIAA's efforts includes: maintaining an Anti-Piracy Unit consisting of a Director of Anti-Piracy Operations, attorneys and a nationwide staff of investigators, to collect and collate "piracy" information on a national scale for dissemination to federal, state and local law enforcement and other government agencies and recording companies; developing findings which lead to effective enforcement of federal and state laws which protect its members' rights by prohibiting, along with other forms of "piracy", bootlegging and the unauthorized duplication of musical compositions; seeking to obtain federal legislation providing for more effective anti-piracy protection through the facilitation of enforcement of copyright laws for musical compositions and increased criminal penalties for convicted pirates, counterfeiters and bootleggers; seeking to secure the enactment and enforcement of state anti-piracy laws; seeking to achieve the United States adherence to international anti-piracy and copyright treaties; cooperating with anti-piracy enforcement programs in foreign nations and working closely with

[1] In the recording industry, the following terms are used to define illicit recordings of sounds:

a. *Piracy*: The unauthorized duplication of sounds contained in a legitimate recording. The term "piracy", in a generic sense, is sometimes used to connote all forms of unauthorized recordings.

b. *Counterfeiting*: The unauthorized duplication not only of the recorded sounds contained in a legitimate recording but also of the label, art work, trademark and packaging of the original recording.

c. *Bootlegging*: The unauthorized recording of a performance that is not legitimately available. Bootlegs are commonly reproductions of concerts or studio outtakes not intended for release. Such bootleg versions are sometimes referred to as "underground" recordings. The term bootleg is sometimes incorrectly used to connote piracy or counterfeiting.

d. *Pirate Compilation*: The duplication of popular sound recordings usually by different artists all on one phonorecord not bearing the customary indicia of legitimate recordings.

the International Federation of Phonogram and Videogram Producers (IFPI) and other foreign national associations; and overseeing select copyright infringement and unfair competition litigation for member companies.

Thus, RIAA is intimately acquainted with the federal copyright law, various state laws, and state and federal criminal statutes, as they pertain to musical compositions and sound recordings.

RIAA's members, as sellers of legitimate sound recordings, are financially damaged by the sale of pirate, counterfeit and bootleg recordings.

RIAA's purpose in submitting this *amicus curiae* brief is to assist the Court in considering the legal status of unauthorized phonorecords infringing musical composition copyrights under the Federal Copyright Law, 17 U.S.C. Section 101, *et. seq.*, and under the federal criminal statute 18 U.S.C. Section 2314.

SUMMARY OF ARGUMENT

The Copyright Act and the National Stolen Property Act ("NSPA") serve separate and distinct functions. In promulgating one, Congress did not repeal the other. The existence of two penal statutes with differing objectives does not create a requirement that one be used to the exclusion of the other. When Petitioner's copyright infringing activities extended into interstate commerce, he violated the penal provisions of both Acts.

The history of NSPA demonstrates that it is intended to prevent the pollution of interstate commerce. Such pollution occurs when phonorecords embodying illegally reproduced and distributed copyrighted musical compositions enter the stream of commerce. Copyrights, as personal property, are recognized as goods. Such copyrighted musical compositions constitute goods, wares or merchandise within the meaning of 18 U.S.C. Section 2314.

Copyrighted musical compositions constitute personal property which can be transported and misappropriated. They are

capable of being stolen, converted or taken by fraud within the meaning of 18 U.S.C. Section 2314. The State of California, from which the stolen property in the instant matter was shipped interstate, recognizes that property equivalent to copyright can be the subject of a theft.

ARGUMENT

I

THE PENAL PROVISIONS OF 18 U.S.C. SECTION 2314 AUGMENT THE REMEDIES FOR COPYRIGHT INFRINGMENT UNDER 17 U.S.C. SECTION 506(a) AND 18 U.S.C. SECTION 2319

A. *Legislative History Of The Statutes At Issue Establishes That The Copyright Act Is Not The Exclusive Remedy For Criminal Activity Involving Copyright Infringment.*

In 1976, Congress generally revised the Copyright Law of the United States, 17 U.S.C. Section 101, *et seq*. Sections 501 through 510 delineated what type of conduct constituted civil and criminal copyright infringement and the remedies then applicable.

Prompted by the burgeoning growth in the piracy and counterfeiting of copyrighted material which is now acknowledged to be one of the most prolific and troublesome areas of white collar crime, Congress, in 1982, enacted the Piracy and Counterfeiting Amendments Act of 1982, Pub. L. 97-180, 96 Stat. 91 (eff. May 24, 1982) codified at 17 U.S.C. Section 506(a) and 18 U.S.C. Sections 2318, 2319. This amendment, *inter alia*, increased the criminal penalties for infringement of copyrighted sound recordings and audiovisual works.

Piracy, counterfeiting and bootlegging have to some extent afflicted the recording industry since its earliest days. However, particularly since the development of tape technology, record

piracy has grown to become a major criminal activity.[2] Congress addressed this problem by enacting the Piracy and Counterfeiting Amendments Act of 1982. *See*, S. Rep. No. 274, 97th Cong. 1st Sess. (1981) p4.

Although the most obvious victims of this crime are the record companies, there are many others who are robbed by these technological thieves. Unlike pirates, record companies pay royalties for each record or tape they sell. Therefore pirates rob the recording artist, the producer, the composer and publisher of the compositions, the musicians who helped make the record and union pension and trust funds of their fair share of the royalties due them from record sales. These people generally depend on those royalties for their livelihoods. Therefore the pirate, who makes none of these payments when selling his illegal copies, is stealing from these people as well. Additionally, the financial loss incurred as a result of piracy ultimately drives up the price of legitimate product. The financial loss to record companies deprives them of funds with which to subsidize less profitable (classical, jazz, etc.) types of music, new performers and composers. Thus, the average consumer is the ultimate victim of this crime, due both to the diminution of the variety of recorded music and the inferior quality of illicit product sold by pirates. Furthermore, as with most other illegal enterprises, a pirate pays no income or other taxes on the money he steals.

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[2] With vast illicit profits at stake, an increasing number of people have been attracted to this crime. The potential profits are enormous. Unlike a record company, the pirate bears none of the initial costs of searching for talent, creating and producing a recording, which can run to several hundred thousand dollars per recording. In addition, unlike legitimate recording companies, pirates do not bear the continuing costs of publicizing and promoting their product and paying royalties. Beyond the cost of purchasing a single commercial copy for use as a master, the pirate incurs only a per unit manufacturing cost of under a dollar. If the pirate duplicates the original packaging as well as the recording and thus makes a counterfeit copy of the original recording, the retail price of these illegal recordings can sometimes run as high as the price of legitimate recordings.

The Piracy and Counterfeiting Amendments Act of 1982 is yet another part of the continuum of Congressional recognition that sound recordings *per se*, in addition to musical compositions, are entitled to copyright protection. See, Act of October 15, 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971) (recognizing a copyright in sound recordings). Musical compositions have been the subject of copyright protection since the Statute of February 3, 1831, c. 16, 4 Stat. 436. *See*, *White-Smith Music Co. v. Apollo Co.*, 209 U.S. 1 (1908).

While copyrights in musical compositions and sound recordings are in some respects treated in a differing manner, [3] the exclusive rights to reproduce the copyrighted work, 17 U.S.C. Section 106(1), and to distribute the copyrighted work, 17 U.S.C. Section 106(3) are, for the purposes of the instant case, identical for both musical compositions and sound recordings. Therefore, there is no distinction between copyrighted musical compositions and copyrighted sound recordings as to their inclusion within the meaning of "goods, wares [or] merchandise" capable of being "stolen, converted or taken by fraud" for purposes of 18 U.S.C. Section 2314.

In adopting the Piracy and Counterfeiting Amendments Act of 1982, the Senate Judiciary Committee noted:

> This significant growth in the crimes of piracy and counterfeiting has been acknowledged by the Department of Justice. In a 1980 Report of the Attorney General entitled 'National Priorities for the Investigation and Prosecution of White Collar Crime,' the Justice Department listed copyright violations as the third most troublesome area of white collar crime. In testifying before this Committee regarding S. 691, a representative of the Department stated that:

[3] See, *e.g.*, 17 U.S.C. Sections 106(4) (public performance right for musical work but not for sound recording); 114 (scope of exclusive rights in sound recordings); and 115 (scope of exclusive rights in nondramatic musical works: compulsory license for making and distributing phonorecords).

> Piracy and counterfeiting of copyrighted material, the theft of intellectual property, is now a major white collar crime. The dramatic growth of this problem has been encouraged by the huge profits to be made, while the relatively lenient penalties provided by the current law have done little to stem the tide.
>
> This rapid growth in piracy and counterfeiting in the recording industry has occurred partly as a result of the tremendous progress in the technological tools for duplicating sound recordings and films.

S. Rep. No. 274, 97th Cong. 1st Sess. (1981) p. 4 (footnotes omitted).

Despite the increased severity of punishment that could now be meted out to copyright infringers, it is beyond peradventure that the Piracy and Counterfeiting Amendments Act of 1982 was not intended to be the exclusive remedy for illicit activity that has as its base copyright infringement. As Senate Report No. 274, *Id.*, at 2 makes manifest:

> [T]he bill is intended to *supplement* existing remedies contained in the copyright law *or any other law* by adding the following language to subsection (a) of the new Section 2319:
>
> . . . and such penalties shall be in addition to any other provision of title 17 *or any other law*
>
> *Id.* at 2 U.S. Code Cong. & Ad. News (1982), p. 128 (emphasis added). The above language was added to 18 U.S.C. Section 2319 specifically to make clear that 18 U.S.C. Section 2319 was intended to supplement existing remedies. *Id.*[4]

[4] Petitioner's reliance on *Sony Corp. v. Universal City Studios, Inc.*, ____ U.S. ____, 104 S. Ct. 774(1982) to support the proposition that the Ninth

Both the legislative history and the unambiguous, explicit language of 18 U.S.C. Section 2319 demonstrate a Congressional resolve to enlarge the scope of remedies available to punish copyright infringers.

B. Coexistence Of Criminal Statutes Which Apply To A Single Pattern Of Criminal Conduct

The mere existence of two distinct criminal statutes under which a defendant may be prosecuted does not create a requirement that one be used to the exclusion of the other; *United States v. Gallant*, 570 F.Supp. 303 (S.D.N.Y. 1983), *United States v. Sam Goody, Inc.*, 506 F.Supp. 380 (E.D.N.Y. 1981). Overlapping statutes may be used jointly or separately. In *Blockburger v. United States*, 284 U.S. 299, 304 (1932), quoting *Morey v. Commonwealth*, 108 Mass. 433 (1871), this Court, when considering whether two statutes were mutually exclusive when applied to the same underlying act, stated:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not, *Gavieres v. United States*, 220 U.S. 338, 342 . . . A single act may be an offense against two statutes . . .

See also, *Periera v. United States*, 347 U.S. 1, 9 (1953). Furthermore, in *Iannelli v. United States*, 420 U.S. 770, 785 n.17 (1975) this Court reiterated the above test and explicitly stated

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(Footnote continued)
Circuit impermissibly expanded the remedies for copyright infringement is misplaced. In *Sony* this Court merely stated that "[t]he remedies for infringement 'are only those prescribed by Congress.'" *Id.* at 796. Petitioner apparently has forgotten that Congress had determined that the remedies for copyright infringement are not exclusively contained in the Copyright Act and the Piracy and Counterfeiting Amendments Act of 1982, declaring that "any other law" may proscribe crimes involving infringement, if the requisite elements are proven.

that its "application . . . focuses on the statutory elements [of the offenses in question, and it can be satisfied if] each requires proof of a fact that the other does not, . . . notwithstanding a substantial overlap in the proof offered to establish the crimes" proscribed by the respective statutes.

In the instant matter, Dowling was convicted, *inter alia*, of nine counts of copyright infringment, in violation of 17 U.S.C. Section 506(a) and eight counts of interstate transportation of stolen property, in violation of 18 U.S.C. Section 2314. Applying the touchstone of *Blockburger, supra*, it is clear that there are two offenses involved, not one. Thus, Section 2314 requires proof that the infringing material unlawfully sold by Dowling was (1) transported in interstate commerce and (2) that its value was $5,000 or more. These essential elements necessary to sustain a conviction under 18 U.S.C. Section 2314 are not requisite to prove copyright infringement under 17 U.S.C. Section 506(a).

Additionally, as the court noted in *United States v. Gallant*, 570 F.Supp. 303, 312, n.12 (S.D.N.Y. 1983),

> [t]he additional element of interstate transportation is substantive. A copyright infringer who violates the criminal copyright laws in one state commits one violation. Someone who infringes a copyright and then sets up an interstate distribution system to market the materials that he has illicitly produced and furthermore, uses this distribution system beyond *de minimis* amount, is guilty of a different and most serious criminal offense.

Titles 17 U.S.C. Section 506(a) and 18 U.S.C. Section 2314 serve separate and distinct objectives as they apply to those engaged in the theft of intellectual properties. 17 U.S.C. Section 506(a) is designed specifically to protect copyright holders from willful infringement of their copyrights. The National Stolen Property Act, in the context of the instant case, seeks to prevent those who have stolen or fraudulently acquired intellectual property belonging to another in violation of the copyright

statute from furthering their criminal plans by making use of interstate commerce to transport such stolen or fraudulently acquired intellectual property. *United States v. Gottesman*, 724 F.2d 1517 (11th Cir. 1984); *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977); *Lyda v. United States*, 279 F.2d 461, 463-65 (5th Cir. 1960).

"When there are two acts upon the same subject the rule is to give effect to both if possible ... The intention of the legislature to repeal 'must be clear and manifest.'" *United States v. Borden*, 308 U.S. 188, 198 (1939), quoting *Red Rock v. Henry*, 106 U.S. 596, 601-2 (1883). Congress has given no indication that the criminal penalties in the Copyright Law and 18 U.S.C. Section 2314 are mutually exclusive when applied to conduct that contravenes both. No such inference may be implied.

Thus, there is no legal basis for Petitioner's contention that his conviction under both 18 U.S.C. Section 2319 and 18 U.S.C. Section 2314 must be set aside.

II

COPYRIGHTED MUSICAL COMPOSITIONS EMBODIED IN A PHONORECORD CONSTITUTE "GOODS, WARES [OR] MERCHANDISE" WITHIN THE MEANING OF 18 U.S.C. SECTION 2314

A. *The Legislative History And Language of 18 U.S.C. Section 2314 Demonstrate Congressional Intent To Enact A Comprehensive and Flexible Statute That Encompasses Both Tangible And Intangible Property*

The National Stolen Property Act, 18 U.S.C. Section 2314, provides, in pertinent part, that

> Whoever transports in interstate or foreign commerce any goods, wares [or] merchandise ... of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud ... [s]hall be fined not more than $10,000 or imprisoned not more than ten years, or both.

Petitioner Dowling argues that his interstate transportation of "bootleg" phonorecords does not violate Section 2314 because he has not "stolen or converted" any "goods" within the meaning of the statute. This contention raises two separate issues: (1) whether intangible property, in particular, the musical compositions embodied in a phonorecord taken in violation of the copyright laws, constitutes goods, wares or merchandise; and (2) whether the unauthorized duplication of copyrighted musical compositions constitutes a stealing, converting, or a taking by fraud.

The history of Section 2314 demonstrates that Congress intended to enact an encompassing, malleable statute to deter the transportation in interstate commerce of all manner of property unlawfully possessed with a value of $5,000 or more. *United States v. Turley*, 352 U.S. 407, 414 n. 13 (1957). Former Attorney General Cummings in commenting on the scope of a bill which amended 18 U.S.C. Section 2314 stated that:

> This legislation proposes to amend the National Stolen Property Act, which in general makes it a criminal offense knowingly to transport in interstate or foreign commerce *any stolen property* of the value of $5,000 or over. (Emphasis added).

S. Rep. No. 674, 76th Cong. 2nd Sess. (1939)

While the phrase "goods, wares, [or] merchandise" is not defined in 18 U.S.C. Section 2314, its legislative history establishes that it is intended to extend broadly to all types of property likely to move in commerce. No distinction is made between items of a tangible or an intangible nature. Rather, the focal point of Section 2314 is the mobility of property intended to move through commerce for the purpose of producing commercial revenue. *United States v. Greenwald*, 479 F.2d

320 (6th Cir. 1973), *cert. denied* 414 U.S. 854 (1973), *American Cyanamid Co. v. Sharff*, 309 F.2d 790 (3rd Cir. 1962), *United States v. Sam Goody, Inc.*, 506 F. Supp. 380 (E.D.N.Y. 1981). "The terms 'goods, wares, merchandise' is a general and comprehenisve designation of such *personal property* or chattels as are ordinarily a *subject of commerce.*" (emphasis added), *United States v. Seagraves*, 265 F.2d 876, 880 (3rd Cir. 1959) (geophysical maps subject of commerce, albeit of a specialized nature); *American Cyanamid Co. v. Sharff*, 309 F.2d 790 (3rd Cir. 1962).

B. Since A Copyrighted Musical Composition Embodied In A Phonorecord Is Personal Property And A Subject Of Commerce, It Constitutes "Goods, Wares [or] Merchandise" Within The Meaning Of 18 U.S.C. Section 2314

The fact that a copyrighted musical composition embodied in a phonorecord is personal property and a subject of commerce constituting "goods, wares [or] merchandise" within the meaning of 18 U.S.C. Section 2314 is evidenced by the nature of a copyright and the bundle of rights granted to a copyright owner.

A musical composition is endowed with commercial value enabling it to be a subject of commerce; see 17 U.S.C. Section 106 defining the bundle of rights accorded copyright owners, including musical composition copyright owners. The proprietor of a copyrighted musical composition can transfer the ownership of such property "by any means of conveyance or by operation of law, and [such intellectual property] is to be treated as *personal property* upon the death of the owner. The term 'transfer of copyright ownership' [of such copyrighted personal property includes] any 'conveyance, alienation, or hypothecation,' including assignments [and] mortgages." (Emphasis added). H. Rep. No. 1476, p. 123, 94th Cong. 2nd Sess. (1976). *See also*, 17 U.S.C. Sections 101, 201.

Even the dictionary definitions of personal property and goods lead to the conclusion that a musical composition protected beneath the panopoly of the copyright law constitutes "goods"

within the meaning and intent of Section 2314. "Goods" is "[a] term of variable content and meaning. It may include *every* species of *personal* property..." Black's Law Dictionary, 624 (Rev. 5th Ed. 1979) (emphasis added). "Personal property is [classified as being] divisible into (1) corporeal personal property, which includes movable and tangible things...and (2) incorporeal personal property which consists of such rights as ...stocks, shares,...and copyrights." *Id.* at 1096.

As the preceding makes clear, notwithstanding their intangible nature, a copyright constitutes both personal property and goods within the ordinary and general usage of these words in the law. Given the intent of Congress that 18 U.S.C. Section 2314 be enacted as a comprehensive and flexible statute, Petitioner Dowling's argument that the meaning of "goods" is not intended to apply to copyrighted material is unfounded.

C. Judicial Analysis Establishes That Intangible Personal Property, Particularly A Copyrighted Musical Composition, Is "Goods, Wares [or] Merchandise" Within The Meaning Of 18 U.S.C. Section 2314

Numerous federal courts that have had the occasion to scrutinize the matter have determined that intangible personal property, including a copyright, qualifies as "goods, wares [or] merchandise" within the meaning of 18 U.S.C. Section 2314. The only decision to the contrary is *United States v. Smith*, 686 F.2d 234 (5th Cir. 1982), which will be considered below.

In *United States v. Seagraves*, 265 F.2d 876 (3rd Cir. 1959), the court affirmed a conviction of conspiracy to violate 18 U.S.C. Section 2314 where the goods, wares or merchandise transported in interstate commerce were "wrongfully supplied *copies* of a number of " geophysical and geological maps. *Id.* 265 F.2d at 878. (Emphasis added). The *Seagraves* court had no difficulty in holding that the copies of maps were goods, wares or merchandise, reasoning that "[s]ince the maps were shown without doubt to be subjects of commerce, albeit of a specialized nature, they are goods or wares or merchandise

within the terms of the Act." *Id.* at 880. In *American Cyanamid Co. v. Sharff*, 309 F.2d 790 (3d Cir. 1962), the court again utilized the "subject of commerce" test in determining that the articles stolen, which included confidential information, were personal property, and if found to be ordinarily a subject of commerce, the provisions of Section 2314 would apply.

The purpose of Section 2314 is to reach all property which has a minimal commercial value of at least $5,000. The "subject of commerce" test is equally applicable to tangible and intangible property, provided that the property has value in the commercial market. This prompted the court in *United States v. Bottone*, 365 F.2d 389 (2nd Cir. 1966) *cert. denied* 385 U.S. 974 (1966) to conclude that the intangible information constituting trade secrets was "the purpose of the theft." In *United States v. Greenwald*, 479 F.2d 320 (6th Cir. 1973) *cert. denied* 414 U.S. 854 (1973), the court, presented with the issue of whether secret chemical formulae fell within the statutory language of "goods, wares [or] merchandise," determined there was a commercial market "for chemical manufacturers to exchange formulae and formulations either by outright sale or through licensing agreement[s]. Significantly, these formulae are treated as assets, in the same manner as machinery, equipment or accounts receivable." *Id.* at 321. Applying the *Seagraves* subject of commerce test, the court looked to the commercial realities of the property in question, rather than its intangible nature, and held that "...given an established, viable, albeit limited, market in chemical formulations ... the normal, ordinary and logical import of the statuorty language dictates the conclusion that the documents (containing the chemical formulations) are 'goods, wares [or] merchandise' within the meaning of the Act." *Id.* at 322. While the formulae were contained on paper, the court discussed the commercial nature of the property, i.e., the formulae, rather than the tangible state in which it existed.

In the present case, there is no question that the embodiment of musical compositions performed by Elvis Presley in unauthorized "bootleg" phonorecords have substantial commercial value. The Petitioner built a million dollar interstate business

through the unauthorized use of copyrighted musical compositions in "bootleg" phonorecords. (Joint Appendix at 24-33).

A plain reading of Section 2314 has prompted numerous courts to hold that a copyright can constitute "goods, wares [or] merchandise" within the meaning of Section 2314. *United States v. Drum*, 733 F.2d 1503 (11th Cir. 1984) *cert. denied* Nos. 84-328, 84-51, 84-5219 and 84-53 (November 26, 1984); *United States v. Gottesman*, 724 F.2d 1517 (11th Cir. 1984); *United States v. Belmont*, 715 F.2d 450 (9th Cir. 1983) *cert. denied* No. 83-769 (February 21, 1984) and No. 83-1445 (May 29, 1984); *United States v. Berkwitt* 619 F.2d 649 (7th Cir. 1980); *United States v. Whetzel*, 589 F.2d 707 (D.C. Cir. 1978); *United States v. Drebin*, 557 F.2d 1316 (9th Cir. 1977) *cert denied* 436 U.S. 904 (1978); *United States v. Atherton*, 561 F.2d 747 (9th Cir. 1977) *United States v. Gallant* 570 F. Supp. 303 (S.D.N.Y. 1983); *United States v. Sam Goody, Inc.*, 506 F. Supp. 380 (E.D.N.Y. 1981). The only decision in conflict with the foregoing plethora of authority is *United States v. Smith*, 686 F.2d 234 (5th Cir. 1982), and is readily distinguishable from the case at bar. (See discussion at II(D), *infra.*)

In *United States v. Sam Goody, Inc.*, 506 F. Supp. 380 (E.D.N.Y. 1981), the court concluded, that there is "no compelling reason why the 'subject of commerce' test cannot be applied here to bring counterfeit tapes properly within the ambit of 'goods, wares [or] merchandise' in Section 2314..." The Court's conclusion is based on the acknowledgement that it is the intangible intellectual properties embodied in individual phonorecords which are of substantial commercial value. *Id.* at 388. The *Sam Goody* court further stated, relying on *United States v. Bottone, supra*, "that when an item derives its value from intangible concepts or intellectual property -- whether copyrighted or not -- contained within it, no theft of the original tangible medium need occur at all; only the intangible component need be taken, ..." *Id.* at 389.

Furthermore, in *United States v. Drebin, supra*, the Ninth Circuit had no difficulty deciding that motion picture

photoplays which are intangibles, fall within the phrase "goods, wares [or] merchandise" in 18 U.S.C. Section 2314, and found the defendant's antithetical contentions "both illogical and contrary to law." The Eleventh Circuit in *United States v. Gottesman, supra*, declared that "the intangible idea protected by the copyright is effectively made tangible by its embodiment upon the tapes and therefore constitutes 'goods, wares [or] merchandise' within the meaning of section 2314." *Id.* 724 F.2d at 1520. The Elventh Circuit in *United States v. Drum, supra*, reasoned that this definition is applicable irrespective of whether a defendant obtains the tangible embodiment of a copyrighted work legitimately or illegitimately. *See also, United States v. Atherton, supra.*

The *Gottesman* court accepted the argument that the property in issue was not the video cassettes, but rather the intangible magnetic signals impressed upon the tapes, and these intangibles constituted "goods, wares [or] merchandise" within the meaning of 18 U.S.C. Section 2314. In *United States v. Belmont, supra*, the Ninth Circuit explained the reasoning behind its holding that the phrase "goods, wares [or] merchandise" encompasses the intangible property of a copyright owner:

> The rights of copyright owners in their protected property are just as deserving of protection from interstate transportation as are the ownership interests of those who own other types of property. When society creates new kinds of property and thieves devise new ways of appropriating that property to their own use, the law against transporting property expands with the growth in the varieties of property. There is no utility in ... sterile formality...

Id. 715 F.2d at 461-462

The recognition by courts of the numerous forms of property which exist in our technological era has resulted in decisions like *United States v. Berkwitt, supra*, where the court recognized that what was stolen was the "fixation of recorded sounds, not

the tangible component parts of the tapes." 619 F.2d at 658. As the court readily acknowledged in *United States v. Bottone, supra*, 365 F.2d at 393, "When the physical form of the stolen goods is secondary in every respect to the matter recorded in them, the transformation of the information in the stolen papers [or in this case the musical compositions] into a tangible object never possessed by the original owner should be deemed immaterial..." Clearly, *Bottone* and its progeny demonstrate that intangible property, such as musical compostions subject to copyright protection are "goods, wares [or] merchandise" capable of being stolen and transported unlawfully in interstate commerce thereby necessitating the unique protection provided by 18 U.S.C. Section 2314.

The commercial value of musical compositions, although intangible in nature, is established by their embodiment in phonorecords which can result in substantial revenue being reaped by the composition copyright owners. Musical composition copyrights constitute property deserving of and requiring the protection against unlawful misappropriation afforded by 18 U.S.C. Section 2314.

D. *The Fallacies Of United States v. Smith*

The only decision which appears to conflict with the conclusion that copyrighted works of authorship, such as in this case, musical compositions, constitute "goods, wares [or] merchandise" which can be "stolen, converted or taken by fraud" within the meaning of 18 U.S.C. Section 2314 is *United States v. Smith*, 686 F.2d 234 (5th Cir. 1982). The *Smith* court relied in large part on rigid and archaic definitions to justify its finding that a copyrighted work is not a "good, ware [or] merchandise." *Id.* at 239 n.5.

First, the Fifth Circuit in *Smith* defined a "copyright" as "nothing more than an incorporeal, intangible right or privilege to engage in or to authorize certain activity." *Id.* This definition is limited. The Copyright Law demonstrates the true meaning, import and essence of copyright in our modern technological

era. In addition to the *Smith* definition of copyright, above, the Copyright Law gives owners the right to exclusive usage, sale, and licensing, as well as rights concerning public performance and derivative works. 17 U.S.C. Section 106. As explained above, a copyright denotes personal property of substantial value, notwithstanding its intangible nature, and affords the owner such significant commercial rights as reproduction and distribution of the copyrighted work, 17 U.S.C. Section 106, as well as providing the owner the opportunity to mortgage, assign, lease, pledge or hypothecate the copyright in any fashion provided under substantive law, 17 U.S.C. Sections 101, 201.

Second, the *Smith* court misapprehends 17 U.S.C. Section 202, the provision which delineates the ownership rights of a copyright holder. The Fifth Circuit misconstrues the divisibility of a copyright by erroneously concluding that "ownership of a copyright does not encompass ownership of the words, sounds, pictures, or images embodied in the *tangible object.*" *Id.* at 240 (emphasis added). The purpose of 17 U.S.C. Section 202 is to clarify that a copyright is intangible property, such as an aggregation of sounds, and even if those sounds are embodied in a tangible object, e.g., tape or disc, the owners of those sounds do not lose any rights to those sounds. Section 202 was specifically designed to give a purchaser of a tangible object which contains copyrighted material only the right to use or dispose of that one specific tangible object. The copyright owner forfeits none of his exclusive rights under the Copyright Law or any other substantive law by disposing of a tangible object which embodies a copyrighted work.

Third, while the dictionary definition of "goods" does not specifically include incorporeal or intangible rights or privileges, it speaks in terms of personal property, which has previously been conclusively proven to include everything corporeal or incorporeal, tangible or intangible. The misplaced reliance of the *Smith* court in its definition of "goods" ignores the important role which copyrights play in the business community.

A recent report of the U.S. Copyright Office, *Report of the United States Copyright Office to the Subcommittee on Patents,*

Copyrights and Trademarks, Committee on the Judiciary, United States Senate, on the Size of the Copyright Industries in the United States (December, 1984),[5] reveals that in 1977 (the last year for which Economic Census data are in final form), "Copyright industries contributed some $55 billion to the United States economy, which amounts to approximately 2.8% of the Gross National Product." *Id.* at "Executive Summary", 8 and 10.

The *Smith* court although acknowledging that 18 U.S.C. Section 2314 should be interpreted broadly, clings to its parochial view which defines a "good" as nothing more than a tangible object. The reasoning of the Fifth Circuit is strained, since it applies archaic notions of property, misconstrues clear statutory language and does not deal with commercial realities.

III

A COPYRIGHTED MUSICAL COMPOSITION EMBODIED IN A PHONORECORD IS CAPABLE OF BEING "STOLEN, CONVERTED OR TAKEN BY FRAUD" WITHIN THE MEANING OF 18 U.S.C. SECTION 2314

As the court in *United States v. Bottone, supra,* specifically held, illicit copying of a copyrighted work is no less a "theft, conversion or taking by fraud" than if the original were so taken. "[T]he physical form of the stolen goods is secondary in every respect to the matter recorded in them, the transformation of the information in the stolen papers into a tangible object never possessed by the original owner should be deemed immaterial..." *Id.* at 393-94. See also, *United States v. Drebin,* 557 F.2d 1316 (9th Cir. 1977). Further, as has been noted by Chief Justice (then Judge) Burger, in an action based on the infringement of copyrighted musical compositions, record piracy "might better be described by other terms connoting larceny." *Shapiro Bernstein & Co. v. Remington Records, Inc.,* 265 F.2d 263, 269 (2nd Cir. 1959).

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[5] Copies of this unpublished report of the U.S. Copyright Office are lodged with the Clerk of this Court.

This Court has instructed lower courts to free their minds from the notion that criminal statutes must be construed by "artificial and conventional" rules. *United States v. Dege*, 364 U.S. 51, 52 (1960) (Frankfurter, J.), quoting *United States v. Union Supply Co.*, 215 U.S. 50, 55 (1909) (Holmes, J.).

It is significant to note that under California[6] state law, the Petitioner's acts would be classified as a "theft". In *People v. Szarvas*, 191 Cal. Rptr. 117 (Cal. App. 2nd Dist. 1983), the defendant, based on his duplication for a fee of certain record albums, was convicted of both Penal Code Section 653h (a)(1) and petty theft. *Id.* at 119.

California Penal Code Section 653h (a)(1) prohibits the willful transfer of sounds that have been recorded on phonograph records or other articles. *Id.* This section provides protection for sound recordings fixed prior to February 15, 1972 [7] and is equivalent to prohibitions against copyright infringement contained in the Copyright Law, 17 U.S.C. Sections 106(1) and (3), 501, 506(a).

The *Szarvas* court had no difficulty in holding that the defendant's conviction under both the "copyright-like" statute and the theft statute was proper.[8]

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[6] In the instant case, petitioner was convicted of shipping stolen property from California to Maryland and Florida. Joint Appendix at A7-8 and A47-A48.

[7] February 15, 1972 is the effective date of the Act of October 15, 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971) which recognized a copyright in sound recordings. Sound recordings fixed on or after that date are subject to the provisions of the Copyright Law, 17 U.S.C. Section 102(a)(7) and equivalent state laws are preempted, 17 U.S.C. Section 301.

[8] Under California Law, a defendant cannot, after conviction, be punished twice where an act or omission is made punishable in different ways by the Penal Code. *People v. Szarvas, supra*, 117 Cal. App. at 122-123. The penal provision in question, California Penal Code Section 654, does not prohibit double convictions. *Id.* at 123. The *Szarvas* court noted that the defendant could properly be convicted for both the unauthorized duplication of sounds count and the theft count, but could only be punished for the more serious offense. *Id.*

A review of the legislative history and the statutory language of Section 2314, with a view toward the common usage of the terms "steal," "conversion" and "taking by fraud" will assist in evaluating whether the statute is applicable in the present case.

The National Stolen Property Act was and is designed to thwart the misuse of interstate commerce. As the court noted in *Lyda v. United States*, 279 F.2d 461, 464 (5th Cir. 1960):

> The aim of [the National Stolen Property Act] is, of course, to prohibit the use of interstate transportation facilities for goods having certain *unlawful qualities*. This reflects a congressional purpose to reach *all ways* by which an owner is wrongfully deprived of the *use* or *benefits* of the use of his property. (Emphasis added).

Further, as noted in *United States v. Frakes*, 563 F.2d 803 (6th Cir. 1977) *vacated on other grounds* 435 U.S. 911 (1978) quoting *Morrisette v. United States*, 342 U.S. 246, 271 (1952):

> What has concerned codifiers of the larceny-type offense is that gaps or crevices have separated particular crimes of this general class and guilty men have escaped throught the breaches.

The *Frakes* court determined that Congress used broad terms to make clear that if a person was deprived of his property by unlawful means such as fraud, a taking without his permission or by a conversion by one rightfully in possession, the subsequent transportation of such goods in interstate commerce was prohibited as a crime. *United States v. Frakes, supra*, 563 F.2d at 806.

This court has defined the term "stolen" as all felonious takings with intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft constitutes common-law larceny. *United States v. Turley*, 352 U.S. 407

(1957). The issue of whether the "goods" were obtained by unlawful methods of acquisition is not to be decided on the basis of technical common law definitions. *Bergman v. United States*, 253 F.2d 933, 935 (6th Cir. 1958).

Conversion has been interpreted as the act of appropriating dishonestly or illegally to one's own use anything of value. *United States v. Evans*, 579 F.2d 360, 361 (5th Cir. 1978); *United States v. McClain*, 545 F.2d 988, 995 (5th Cir. 1977). Fraud is defined as an intentional misrepresentation, concealment, or nondisclosure for the purpose of inducing another, in reliance upon it, to part with something of value or surrender a legal right. *United States v. Evans, supra*, 579 F.2d at 361.

This Court in *Morrissette v. United States*, 342 U.S. 246 (1951) delineated what constitutes a conversion.

> Conversion...may be consummated without any intent to keep and without any wrongful taking, where the initial possession by the converter was entirely lawful. Conversion may include misuse or abuse of property. It may reach use in an unauthorized manner or to an unauthorized extent of property placed in one's custody for a limited use.

Id. at 271-72.

The terms "stolen, converted or taken by fraud" were extended broadly to cover all forms of wrongful taking, *United States v. Sam Goody, Inc.*, 506 F. Supp. 380 (E.D.N.Y. 1981); *United States v. Plott*, 345 F. Supp. 1229 (S.D.N.Y. 1972).

In *United States v. Handler*, 142 F.2d 351, 353 (2d Cir. 1944), the court commented on the intended breadth of the terms in Section 2314:

> In our opinion the statute is applicable to any taking whereby a person dishonestly obtains goods...belonging to another with the intent to deprive the owner of the rights and benefits of ownership.

Applying the above principles to the case at bar, it is demonstrated that an unauthorized reproduction of musical compositions subject to copyright protection is a clear example of stealing, converting, or taking by fraud. The rights of copyright owners in their property are just as deserving of protection as those of the owner of other types of property, *United States v. Drum, supra; see also, United States v. Belmont, supra.*

There is also no question that the "goods, wares [or] merchandise" do not have to be transported in exactly the same form as they were when "stolen, converted or taken by fraud." Nearly every court considering an indictment under Section 2314 has read the words "the same" not to require literally that what is transported be in exactly the same form as what was stolen. *United States v. Bottone, supra,; United States v. Lester*, 282 F.2d 750, 755 (3d Cir. 1960) *cert. denied*, 364 U.S. 937 (1961); *United States v. Atherton, supra*, 561 F.2d at 752.

Thus, the court in *United States v. Sam Goody, Inc., supra*, had no problem finding that criminal copyright infringement by unauthorized reproduction or unauthorized distribution of copyrighted sound recordings supported a conviction under Section 2314. The court reasoned that the illegal conduct resembled a

> traditional conversion, in that it involves the unauthorized appropriation of property belonging to another party after the property had been lawfully given to the infringer for a limited use, and the requisite intent on the part of the infringer to put the property to his own use and for his own benefit.

Id. 506 F. Supp. at 391.

The *Sam Goody* court further added that such conduct also qualifies as stealing or taking by fraud under the statute. *Id.*

Additionally, the Ninth Circuit in *United States v. Belmont, supra*, found that defendants could be convicted under Section 2314 for interstate sales of unlicensed videotaped cassettes of

motion pictures. The court determined that the genesis of the copyrighted work, whether it be acquired lawfully or illegally was not conclusive; rather the unauthorized duplication of copyrighted works was sufficient to constitute stealing, conversion or a taking by fraud. Addressing this issue, the court in *United States v. Drum, supra,* declared that the defendants' unauthorized appropriations were irrelevant to the charges against them, "[L]egitimate acquisition of copyrighted material does not ameliorate the effect of subsequent illegal duplication and distribution of that material." *Id.* 733 F.2d at 1506. Also, in *United States v. Drebin, supra,* the court reiterated that illicit copying of a copyrighted work is no less a "theft, conversion or taking by fraud" than if the original were also taken.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

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